

Pham (Migration) [2021] AATA 2306 (21 June 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Ms Ngoc Thuy Pham
VISA APPLICANT:	Mr Van An Nguyen
CASE NUMBER:	1819435
DIBP REFERENCE(S):	BCC2017/2294465
MEMBER:	Meredith Jackson
DATE:	21 June 2021
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations

Statement made on 21 June 2021 at 3:39pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – spouse or de facto partner – validly married – limited joint finances while applicant in home country – household and social aspects of relationship – nature of commitment – met and married while applicant an unlawful non-citizen – lengthy overstay after breakdown of previous relationship and loss of business – age difference – sincere and consistent evidence – best interests of sponsor’s Australian-born children – decision under review set aside

LEGISLATION

*Migration Act 1958 (Cth), ss 5F(2)(a), 65
Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 309.211(2), 309.221*

CASES

Bretag v MILGEA [1991] FCA 582

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 28 June 2018 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 23 June 2017 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.221(2) because the delegate was not satisfied that the visa applicant was the spouse or de facto partner of the sponsoring partner.
4. The review applicant appeared before the Tribunal by telephone conference on 17 June 2021 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant by telephone from Vietnam.
5. The review applicant was represented in relation to the review by her registered migration agent Bao Nhu Van Truong
6. For the following reasons, the Tribunal has concluded that the decision under review should be remitted for further consideration.

7. BACKGROUND

8. The review applicant is Nguoc Thuy Pham, a 49 year-old citizen of Australia. The visa applicant is Van An Nguyen, a 38 year old citizen of Vietnam. Mr Pham was last onshore on 13 June 2017. Between 26 March 2013 and 13 June 2017, the applicant was in Australia unlawfully, having breached his visa conditions after arriving via New Zealand on a visitor visa. On 7 May 2016 the parties claim they met at a supermarket. They dated, Mr Nguyen proposed, and they married on 2 April 2017. On 30 May 2017 the visa applicant was issued a Bridging E visa which expired on 13 June 2017. The parties departed for Vietnam together on 13 June 2017 while Ms Pham's two children remained in Australia. They lodged a partner visa application and Ms Pham returned on 22 June 2017. She made a series of short visits to Vietnam after that but claims she could not stay there because she has two Australian children whose lives are here. The parties have not seen each other since February 2020. The delegate found that it was likely the relationship was contrived for immigration purposes.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in the present case is whether the visa applicant is the spouse or de facto partner at the time of the visa application and at the time of this decision.

Whether the parties are in a spouse or de facto relationship

10. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the

present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.

11. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

12. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The visa applicant provided evidence with the visa application of a Queensland Marriage Certificate recording that the parties were married on 2 April 2017. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

13. Claims

14. The review applicant's claims were summarised at the start of the hearing. They are that the parties are in a genuine spouse relationship; are committed to each other for the long term; that they are still in love; and that the period in which Mr Nguyen became unlawful was a response to the hurt he had suffered after the breakdown of a previous relationship in Vietnam that led to him losing his social and business status, a de facto partner and his investments, while he was returning from a short holiday in New Zealand.
15. At the hearing, the applicant's representative provided initial comments to the effect that before coming to Australia, Mr Nguyen had many opportunities to travel the world and settle somewhere if he so chose. He travelled to Germany, to the United States four times, to France, Israel and other Asian countries. He had had opportunities to overstay in those countries but did not. When he arrived in Australia from New Zealand, Mr Nguyen was on his way home after a short holiday and held a return ticket to Vietnam. He was due to transit through Australia but he wanted to see his brother, and once there, had news from Vietnam that left him in despair. His de facto and business partner, who was 14 years older than him, had "kicked him out" of her life and business and had cheated on him with another man. While he was in Australia, she cut off his access to the business without notice and ended the relationship permanently.
16. In oral evidence, given separately from that of Mr Nguyen, Ms Pham stated that Mr Nguyen had told her he was due to transit through Australia but decided to stay and "forgot about" his obligation to leave the country. With his visa application, Mr Nguyen stated that he lost face going from being a vice director with shares in two companies that he ran with his partner, to having lost everything "in the blink of an eye". He claims he was ashamed to return to Vietnam.

17. No supporting evidence has been provided to the Tribunal of the travel and overstay circumstances described, however the Tribunal accepts that the parties gave evidence separately and their accounts aligned.

18. Circumstances of the relationship

19. Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.

20. Ms Pham stated that the parties do not jointly own property or other assets; nothing more than the bank account they hold together, which has a very low balance. She said that as Mr Nguyen lost his assets in the breakup with his former partner, and because he earns a relatively limited amount in Vietnam and she cares for her elderly parents, they have little to their names, jointly or otherwise. Mr Nguyen gave evidence that his parents have a mango orchard in Vietnam where he now works. He owns a small piece of land of about 1000 square metres in his own name.
21. The Tribunal accepts that it is difficult to provide evidence of a pooling of resources in such circumstances, particularly because the relationship is a long distance one supported by very little in the way of income. The Tribunal affords the financial considerations some weight in its assessment.

22. The nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.

23. Ms Pham gave evidence that the parties lived together with her children after they moved in together to a rental home on 1 April 2017. They were married on 2 April 2017. They had two months and 11 days together before Mr Nguyen was required to leave Australia as his visa was expiring. In that time she said, he always helped with house chores, cooking, and sharing the supervision of the children and their homework. In his interview with the Department at the time of the visa application Mr Nguyen stated:

"We wake up at 07:00- 07:30, we prepare breakfast for the children, we send them to school at 08:00 and the school is about 30 minutes from home and we go out for shopping and return home. We cook and do housework and we have lunch and she teaches me English and comes to pick up the children. We then return home and help the young child to study."

24. Ms Pham stated that Mr Nguyen was always very nice to her and she loves him, he is a good person. She found out eventually that he had overstayed his visa, but regardless of that she still loved him. In her statement with the visa application, she declared the parties had many plans for their future. When Mr Nguyen was granted a visa to return to Australia, he will look for a job and she will run their home. She said they have planned to buy a small house for their family of four. They have discussed having a child, and she really wants to have a child with him, but they have to be realistic about her age. She said he told her that this was not a factor when he made the decision to propose; because being with her was enough for him. She stated that Mr Nguyen gets on very well with the children and regards them as his own: *"He told me not to become depressed due to the pressure about having a child as to him, it doesn't really matter if he has a child or not. I am very touched with the honesty and the love that An has for me."*
25. The applicant referred to the age difference between the parties, which is that Ms Pham is 11 years older than Mr Nguyen, a factor that her parents initially were reluctant to embrace because they thought he may be using her, but once they got to know him, they changed their mind about him and accepted him fully. Their wedding was conducted as an ancestral

marriage ceremony held at her parents' house and a reception afterwards with 70 guests, friends and siblings of the applicant. Ms Pham's sister flew from Melbourne to attend.

26. *Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.*

27. The Tribunal granted the review applicant time to submit Statutory Declarations in support of the relationship. Ms Pham's sister, Pham Xuan Huong stated that she became aware of the relationship in 2016. She claimed her sister has never been happier in her adult life and their parents willingly gave consent for the marriage. She stated she believes the relationship would be long lasting. Bui Thi Tin, a friend, stated that he had known Ms Pham through the Vietnamese community and had helped him with his hospital visits prior to meeting her husband and attending their wedding. He considered the relationship to be important to each of the parties. Tran Tri Cuong, a friend, stated that Ms Pham is well known for helping people. Also a wedding guest, the declarant stated that their life together was peaceful and Mr Nguyen seemed to get along well with Ms Pham's sons; it was a shock when their visa was refused because Mr Nguyen was a father figure to the boys. Luu Buu Hung, a friend, stated that Ms Pham was a generous and caring person while Mr Nguyen was a mature man and an introvert who does not talk much but knows how to look after Thuy and her children. The impression is that they all love each other. The declarant was also invited to the wedding. Nguyen Thi Dong, a friend, stated that Mr Nguyen was a quiet man who paid his partner a lot of attention. They were a loving couple and Mr Nguyen cares about Ms Pham and the children. The declarant noted that a few months after the wedding, the parties flew back to Vietnam just so Mr Nguyen could come back to Australia to settle with Thuy and it was unfortunate the visa was refused. The declarant stated the relationship is loving and likely to be long lasting. Evidentiary photographs were provided of events in Australia at Ms Pham's sister's home and others during outings. The most recent ones in Vietnam were taken in February 2020 when Ms Pham went to a wedding of one of Mr Nguyen's nephews with members of his family.

28. The Tribunal has considered the social aspects of the parties' relationship and is satisfied they presented themselves as a couple to a diverse range of friends and family in wide-ranging situations, including at their wedding reception. The Tribunal affords the social aspects of the relationship weight in the applicant's favour.

29. *Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.*

30. The parties gave consistent accounts of how they met in May 2016, at Woolworths, and how things unfolded when they got together frequently after that. Ms Pham said she had two children from a previous relationship and she did not know how that would go. But Mr Nguyen proposed on 22 December 2016 and she willingly accepted. They had never been married to anyone but had both had de facto relationships that failed. Mr Nguyen's former relationship circumstances are described earlier in these reasons and Ms Pham said her relationship failed due to drug abuse on the part of her de facto partner. Both wanted a wedding and a formal marriage. After living together for a couple of months they left Australia for Vietnam, at the time of the expiry of Mr Nguyen's Bridging visa (BVE), but the trip was planned so Ms Pham could meet Mr Nguyen's family. She stated that she really wanted to know more about him, his family and relatives and more generally, about him. Her children stayed in Australia in the care of her sister. While in Vietnam, the parties lodged the Partner visa application. Ms Pham returned home to Australia on 22 June 2017. The visa was refused and after that, she visited him "four or five times". These trips were of around a week

in duration, due to her being unable to leave her children for long. Ms Pham's movement record supports the travel described.

31. The Tribunal questioned Ms Pham as to why her children had not travelled with her and she stated it was not feasible as school holiday trips for all three were too expensive. She stated that the family has been affected by travel restrictions and they maintain the relationship by telephone. The Tribunal questioned Ms Pham as to why she chose not to go to Vietnam to live, taking her children, and she stated that it was not a reasonable consideration as the children were born here, had schooling and other arrangements here, and Vietnam did not offer a viable alternative for the family, so they have placed their hope in the review outcome. She stated that they try their best to stay in contact and neither of them has lost commitment to the relationship. Ms Pham acknowledged the gap in their ages:

- *"It is a big gap in age, but it is not an issue. In the period of getting to know each other over 11 months, I realised he was the type of husband I wanted, and he did not see the age as a barrier and it has never been for me. I have to say initially I was concerned, but because he treated me well, I realised he was the type of man I wanted to have as a husband."*

32. Mr Nguyen gave evidence that despite four years having passed since they were together, their relationship is life long, so four years is a part of that.

33. *"Initially we both thought it was only temporary for a year or so but it after three years we were quite down. There but there is nothing more we can do but encourage each other to be strong. We also hope we will be reunited and look after the two children. We are far apart and we ring often and comfort each other. My wife's financial circumstances in Australia mean she can't afford to come and visit me. Initially my wife thought about moving to Vietnam, but everything about Australia is superior to Vietnam and if she were to come, we might survive but the children would find it hard to get used to the lifestyle."*

34. The Tribunal has considered all the evidence before it, including the declarations of the parties and third parties who have declared that it is a genuine and committed relationship. The Tribunal found both applicants to be sincere and consistent witnesses and while it is difficult to assess whether the relationship will survive after four years of living apart, the Tribunal considers, on balance, that it has personal dynamics that encourage it to do so, including the best interests of Ms Pham's children who declarants and applicants state have a strong relationship with Mr Nguyen. The Tribunal concludes the relationship is genuine, committed and mutually supportive. On balance, the Tribunal is satisfied that the nature of the persons' commitment to each other is strong and sustainable and they see the relationship as long term. The Tribunal weighs this in the applicant's favour.

35. **Other considerations**

36. The applicants do not dispute that Mr Nguyen was unlawful in Australia for four years. The Tribunal reminded the visa applicant that overstaying a visa for a long period is a breach of conditions and not consistent with the expectations of the visa program. The Tribunal stated that Mr Nguyen came to Australia to transit, stayed to see his brother, and then remained here for a long period unlawfully. The claim that he did so because he had to get over the shock of being stripped of his status, relationship and assets in Vietnam while he was on holiday, may be understandable but does not mitigate the breach.
37. The Tribunal asked him why he deserved consideration for another visa when he had overstayed a previous one. He responded: "I am aware by overstaying I did the wrong thing, and I still regret what I did. I got locked out of the company's online platform by the person I

was involved with and with whom I ran the company. I co-owned it with her. She told me that when I left Vietnam, I was no longer responsible and she locked me out. Because I had trusted her, I did not have a legal claim to the company. I suspected and then found out she was having an affair with someone else at work. We had an argument about it and I left Vietnam for New Zealand at that time. When it happened, I did not know what to do, everything I had was gone and I could not think straight. I had nowhere to go, in both places.

38. He stated that it was not the case that this is a contrived relationship so he can stay in Australia. "The day I met Thuy she changed my viewpoint and turned me into a different person. She loves me and I love her. The fact is Thuy is a very good person, when she found out I overstayed, she did not look down on me. She never made demands on me for financial support or anything like that. Just comparing her with that other person, Thuy is the type of person I want to spend my life with in a long and lasting relationship. With regards to the overstay I am still regretting what I did and if I could turn back the clock, I would never do it. I have a family and a wife and I want to make up for it.
39. Ms Pham commented that the relationship is four years old now, and she hopes it will be considered genuine, because: "*I really want my husband to be with me and my children.*"
40. The Tribunal has considered the specified matters in s.5F(2)(b)-(d) regarding whether there is a mutual commitment to shared life to the exclusion of others; a genuine and continuing relationship; and that the parties live together and not separately and apart on a permanent basis.
41. The Tribunal finds that the relationship satisfies those requirements. The parties demonstrated at hearing, and their friends and family have provided sworn support that the relationship is one of mutual commitment to a shared, genuine and continuing life together. The parties do not live together because Mr Nguyen has been in Vietnam since 2017 for immigration reasons, however the Tribunal is satisfied that the two are regularly in touch. After the hearing they provided evidence of 39 calls made by Ms Pham to Mr Nguyen between 19 March 2021 to 17 May 2021. During their respective testimonies before the Tribunal they appeared to be very supportive of each other insofar as that can be ascertained by telephone, however they appeared to be sincere and truthful witnesses. They argue that despite Mr Nguyen's breaches, their relationship is the real thing and will last their lifetimes with significant benefits for them all, but particularly will provide stability, support and overall benefits for Ms Pham's two children.
42. In forming a view, the Tribunal is aided by the authority in *Bretag v MILGEA* [1991] FCA 582, which is that, to the extent that later events logically show the existence or non-existence of facts at an earlier time, those later events may be taken into account to show the existence or non-existence of facts at the earlier time.
43. Mr Nguyen's delinquency in relation to the visa program is a serious breach, but it does not, in and of itself, determine the genuineness of the relationship. The Tribunal has taken into account all the specified circumstances of the relationship and assessed the parties' overall credibility as witnesses. It has also taken into account the delegate's finding that Mr Nguyen did not regularise his status until he secured a sponsor. In conclusion, while some aspects of this case, such as the period of unlawfulness, remain concerning, the Tribunal considers the applicants have demonstrated credibility in their statements and provided credible witnesses in support of a genuine union, which the Tribunal affords considerable weight. Further, the relationship has survived throughout a long period wherein the couple have been effectively unable to live together because Mrs Pham has responsibilities to her Australian-born children and few resources. Further, they have convincingly argued that having survived four years of stressful separate living, the relationship between them remains strong. Balancing those elements the Tribunal weighs in the applicant's favour, and those it weighs against, the

Tribunal is satisfied that best and preferable decision is that there is a genuine spousal relationship between the parties.

44. The Tribunal finds the visa applicant was the spouse or de facto partner at the time of the visa application and continues to be at the time of this decision.
45. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made at the time of this decision.
46. The Tribunal finds the visa applicant meets cl.309.211 and cl.309.221.
47. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

48. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations.

Meredith Jackson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).